Petition

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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA, etc.,

Petitioner,

v.

GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION, etc., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

California has enacted as California Civil Code 711, the ancient real property doctrine which prohibits unreasonable restraints on alienation of real property. This statute, as interpreted by the California Supreme Court in *Wellenkamp* v. *Bank of America,* (1978) 21 Cal.3d 943, prohibits the automatic exercise by institutional lenders of a provision included in note and deed of trust instruments which permits the lender to declare the entire unpaid balance of the loan immediately due and payable in the event the borrower conveys all or any portion of his interest in the real property securing the loan. California restricts the exercise of such a provision, typically known as a "due-on-sale" clause, to those situations where the conveyance of the borrower's interest in the real property would result in an impairment of the lender's security interest.

The People of The State of California commenced an action against, *inter alia,* Glendale Federal Savings and Loan Association ("Glendale") seeking an injunction against Glendale's wholesale violation of California Civil Code § 711 and a declaration that Glendale was bound by state law. After removal of the action from Los Angeles County Superior Court to the United States District Court for the Central District of California, the Federal Home Loan Bank Board ("Board" or "FHLBB") intervened and, after remand of the case to State court remained a party to the action.

At the time the action was filed by The People, there existed a regulation promulgated by the Board, pursuant to its authority under the Home Owners' Loan Act of 1933, 12 U.S.C. 1464 *et seq.* ("HOLA"), requiring federally chartered savings and loan associations to utilize lending instruments that provide for "full protection" of the lender's security (hereinafter "preregulation loans"). Subsequently, the Board promulgated a new regulation dealing specifically with "due-on-sale" clauses which (except in certain situations not here relevant) purported to authorize federal associations to exercise "due-on-sale"

clauses whenever the borrower has conveyed his interest in the real property securing the loan ("post regulation loans"). 12 C.F.R. § 545.6-11 (recently recodified as 12 C.F.R. § 545.8-3).

In defending this action both Glendale and the FHLBB argued that the Board's regulations pre-empted California Civil Code § 711. The trial court refused to rule on the post-regulation loan issue (on the theory that the state was collaterally estopped to proceed). With respect to the preregulation loans, the trial court after a trial on the merits ruled that state law was not pre-empted and that Glendale was required to comply with California Civil Code § 711. On appeal, the California Court of Appeal, Second Appellate District reversed the trial court on the collateral estoppel issue and then ruled that state laws regulating the exercise of due on sale clauses as applied to federally chartered savings and loan associations were pre-empted with respect to both loans issued prior to the effective date of the Board's specific "due-on-sale" regulation and loans made on and after that date. The Court of Appeal also ruled that application of the doctrine of sovereign immunity prevents the FHLBB from being a party to a state court proceeding. The California Supreme Court subsequently denied the People's petition for hearing and ordered that the opinion be unpublished.

Accordingly, the questions presented by the within Petition for Writ of Certiorari are:

1. Did the Court of Appeal err in ruling that state laws regulating the exercise of "due-on-sale" clauses are pre-empted by HOLA and the regulations of the Board?

2. Did the Court of Appeal err in concluding that application of the doctrine of sovereign immunity prevents the Board from being a party to this action?

Parties To The Proceeding

The Petitioner, Plaintiff in the trial court and appellant and Cross-Respondent in the Court of Appeal, is The People of the State of California by and through the Attorney General and the Secretary of the California Business, Transportation and Housing Agency.[1]

The respondents are Glendale and the Board. Glendale was a defendant in the Trial Court and respondent and cross-appellant in the Court of Appeal. The FHLBB was an intervenor in the Trial Court and an appellant in the Court of Appeal.

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[1] The California Business, Transportation and Housing Agency was, at the time the suit was commenced, known as the California Business and Transportation Agency.

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PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

The decision of The California Court of Appeal, Second Appellate District, from which the within petition is taken, has been published at 122 Cal.App.3d 860 (1981).[2] A copy of the opinion is attached hereto at Appendix, pp. A1-9.

[2] The California Supreme Court, on October 28, 1981, denied The People's petition for hearing in this case. In addition, the Court, in accordance with the California Rules of Court, Rule 976, ordered that the opinion not be published in the Official Reports. Rule 977 of the California Rules of Court prohibits all courts and parties to any other action or proceeding from citing an opinion that is not published in the Offical Reports; thus at least as to California Courts, eliminating any precedential value of the decision.

II

GROUNDS FOR JURISDICTION

The decision of the California Court of Appeal, Second Appellate District was rendered on August 21, 1981. A timely petition for rehearing was denied by the Court of Appeal on September 1, 1981. The California Supreme Court denied The People's Petition for Hearing on October 28, 1981, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

III

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS RELEVANT TO THE QUESTIONS PRESENTED

The constitutional provisions, statutes and regulations relevant to the questions presented are: (1) Article VI, Clause 2 and Amendment X of the United States Constitution; (2) Section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(a); (3) 12 C.F.R. § 545.3(f) and (g); and (4) California Civil Code § 711.

IV

STATEMENT OF CASE

In January, 1976, plaintiff, the People of the State of California, by and through the Attorney General and the Secretary of the Business and Transportation Agency of the State of California, filed this case in the Los Angeles County Superior Court seeking relief against Glendale and Verdugo Service Corporation (the California trustee for Glendale) for violation, *inter alia,* of California Civil Code section 711. That

section, as interpreted by the California Supreme Court in *Tucker* v. *Lassen Savings and Loan Association,* (1974) 12 Cal.3d 629 (*"Tucker"),* prohibits the automatic exercise by a lender of a due-on-sale (or loan acceleration) clause in the loan instrument when the borrower transfers the property which was the security for the loan. In *Tucker,* the California Supreme Court restricted the exercise of the due-on-sale clause to those situations where the transfer of an interest in the property impaired the security interest of the lender or subjected the property to waste. The transfer of the real property security in *Tucker* was by means of an installment land-sale contract.

The California Supreme Court in *Wellenkamp* v. *Bank of America, supra,* (1978) 21 Cal.3d 943, subsequently confirmed that the automatic exercise of a due-on-sale clause, when the borrower transfers the real property security by any means, including outright sale, violates Civil Code section 711. California law, as declared in *Tucker* and *Wellenkamp,* does *not prohibit* the use of or exercise of due-on-sale clauses. Rather, California law allows enforcement of the clause where such enforcement is reasonably necessary to protect against an impairment of security or waste or risk of default.

Immediately after the filing of this case, Glendale removed the action to federal court and the Board intervened. Apparently the federal savings and loan associations believed that the federal forum would be more hospitable to their view of preemption than would be the state courts. *(See, Meyers* v. *Beverly Hills Federal Savings & Loan Ass'n.* (9th Cir., 1974) 499 F.2d 1145.) The People moved to remand, and almost two years later, the Federal District Court remanded the case to State Court. *(People* v. *Glendale Federal Sav. & Loan Ass'n.)* (C.D Cal. 1979) 475 F.Supp. 728.) During the intervening time, Glendale filed an action in the Federal District Court against the Real Estate Commissioner of the State of California, David H. Fox, and others arising out of an alleged denial of a public report under the Subdivided Lands Law (California Business and Professions Code §§ 11000 *et seq.*) based on the

failure of Glendale's lending documents to conform to restrictions imposed by California law with respect to enforcement of due-on-sale clauses. Glendale also named the Board as a defendant. The Board admitted each and every allegation of the complaint and then filed a cross-claim against the California officials. On the Board's own motion the Board's cross-claim as to loans made prior to the effective date of the Board's specific due-on-sale regulation was dismissed without prejudice. The federal savings and loans and their friendly regulator, the Board, went through the same exercise in a Sacramento Federal District Court on the same issue.[3] Such tactics have been questioned. (See, *Michigan Savings & Loan League* v. *Francis* (E.D. Mich. 1980) 490 F.Supp. 892, 897.)

After the first remand, Glendale and the Board once more removed the action again to Federal Court, and again the Federal Court remanded the case. Clearly, Glendale was seeking to delay the instant case in order to obtain a prior Federal Court ruling in its later-filed federal cases. Again the court held the removal to be improper. Meanwhile, the Board, which had voluntarily intervened in this case while it was in federal court in order to assist Glendale in retaining federal jurisdiction, sought to have itself dismissed from the action after the case was remanded to state court. The trial court held that the Board could not be dismissed because it had voluntarily intervened in the action and that it had also made a general appearance in state court. The Court of Appeal denied a writ by the Board challenging jurisdiction and the California Supreme Court denied a petition for hearing on that writ.

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[3] In a memorandum decision, the Ninth Circuit reversed the District Court on the grounds that no case or controversy was present. Glendale has filed a Petition for Certiorari with this court seeking review of the Ninth Circuit's ruling. *Glendale Federal Savings and Loan Ass'n.* v. *David H. Fox, etc., et al.*, 459 F.Supp. 903 (C.D. Cal. 1978) and 481 F.Supp. 616 (C.D. Cal. 1979), *rev'd.* No. 79-3573 (9th Cir., Sept. 23, 1981), *Pet. for Cert. docketed* No. 81-1192 (U.S. 1981) ("*Glendale* v. *Fox*"); *Conference of Fed. Sav. & Loan Ass'n., etc., et al.* v. *Alan Stein, etc., et al.*, 495 F.Supp. 12 (E.D. Cal.) (1979), *rev'd* No. 79-4818 (9th Cir., Sept 23, 1981), *Pet. for Cert. docketed*, No. 81-1192 (U.S. 1981) ("Conference v. Stein").

In addition to its appearance at trial, the Board thereafter filed papers in the trial court proceeding, participated in every aspect of this case and made a general appearance.[4] It is also important to recognize that the Board intervened in this case seeking an affirmative declaration that state law was pre-empted, and willingly became a defendant and cross-claimant in two federal actions (*Glendale* v. *Fox), supra,* and *Conference* v. *Stein, supra,* without any assertion of sovereign immunity.

Glendale and the Board, by the use of these tactics succeeded in obtaining a federal court ruling first and then invoking unjustly the federal ruling to collaterally estop the People in the state court proceeding.

The Federal District Court entered judgment in favor of Glendale and the Board as to post-regulation issues in *Glendale* v. *Fox.* The trial court in the instant case held that by reason of the Federal District Court judgment, the People were collaterally estopped from litigating the application of *Wellenkamp* to loans made by Glendale after promulgation of the Board's 1976 regulations, ("post-regulation" loans). The instant case proceeded to trial as to pre-regulation loans. Judgment was rendered in favor of the People as to pre-regulation loans. Thus, the trial court held, following a trial, and the issuance of extensive findings of fact and conclusions of law. As to loans made prior to June of 1976 the trial court found, *Wellenkamp* applied and that federal law did not preempt as to the application of *Wellenkamp* to pre-regulation loans. The trial court did not reach the issue as to whether *Wellenkamp* could

[4] The Board filed numerous documents in the Trial Court, including the following: Board's Objections to Findings; Board's Motion to Dismiss; Board's Request for Judicial Notice; Board's Opposition to Compel Attendance of Witness and Production of Documents at Trial; Board's Responses to Plaintiff's Request to Serve and Deposit a List of Expert Witnesses; Board's Responses to Interrogatories; Board's Responses to Request for Production of Documents; Board's Responses Regarding Depositions.

apply to loans made after the Board regulations because of the doctrine of collateral estoppel. Thereafter, the federally chartered savings and loans prevailed in their other and duplicative federal action, *Conference* v. *Stein,* but neither the trial court nor the Court of Appeal accepted Glendale's contention that this federal case should also collaterally estop the People as to all issues in the instant case.

The Court of Appeal in the instant case held that the collateral estoppel doctrine did not apply at all and thus proceeded directly to the pre-emption issue.[5] The appellate court also concluded that because of the doctrine of sovereign immunity it lacked jurisdiction over the Board. These deficiencies in the opinion were raised in plaintiff's Petition for Rehearing, which was denied on September 1, 1981. The California Supreme Court denied the People's Petition for Hearing on October 28, 1981.

V

REASONS FOR GRANTING THE WRIT

A. Important Policy Considerations Militate In Favor of The Granting of the Writ.

The issue of whether or not state law relating to due-on-sale clauses applies to federally-chartered institutions is one of great significance to California. First, landowners—commercial and residential—have a vital stake in the ability to freely transfer their property. Potential buyers have the same interest. Second, federal associations that do business in

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[5] The Court was correct in not applying the doctrine of collateral estoppel because, *inter alia,* it cannot be applied to frustrate enforcement of laws serving an ongoing public interest (*California Optometric Association* v. *Lackner* (1976) 60 Cal.App.3d 500, 505); it would result in an injustice and prevent a decision on an issue of great public importance (*Consumer's Lobby Against Monopolies* v. *Public Utilities Com.* (1979) 25 Cal.3d 891, 902; *Perez* v. *City of San Bruno* (1980) 27 Cal.3d 875, 878; *City of Berkeley* v. *Superior Court* (1980) 26 Cal.3d 515, 520 fn.5; *Chern* v. *Bank of America* (1976) 15 Cal.3d 866, 872;) and it would affect the rights of many third persons. (*Louis Stores, Inc.* v. *Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749, 758.) Moreover, there was not an identity of parties, and the Eleventh Amendment to the Constitution may well preclude using an action against state officials to bind the state when the state could not be made a party.

California with California residents and lend on California real property should receive no more favorable treatment than their counterpart state associations or state and national banks which comply with local real property laws. Third, those in the real estate industry have a great interest in the enforcement of California law because they favor the free alienation of property provided for by California law. Fourth, pre-emption in this case would render federal associations immune from many state laws, making them virtual federal enclaves. Finally, the People believe that the combined judgment of the legislative and judicial branches of state government with regard to local real property and contract law should not be dictated by a three person non-elective federal board, at least not without express congressional language.

Two reported California Court of Appeal decisions, both of which are now pending before this court, have held that there is no pre-emption. (*Panko* v. *Pan American Fed. Sav. & Loan Ass'n.* (1981) 119 Cal.App.3d 915, 174 Cal.Rptr. 240, *appeal docketed,* No. 81-922 (U.S. 1981); *de la Cuesta* v. *Fidelity Federal Savings and Loan Ass'n.* (1981) 121 Cal.App.3d 328, 175 Cal.Rptr. 467, *appeal docketed,* No. 81-750 (U.S. 1981)). Additionally, other state courts have reached the same conclusion. (*See, Holiday Acres No. 3* v. *Midwest Federal Savings and Loan Assn. of Minneapolis* (Minn. Sup.Ct. 1981) 308 N.W. 2d. 471; *First Federal Savings and Loan Association of Englewood* v. *Lockwood* (Ct. of App. Fla. 1980) 385 So. 2d 156; and Note, *Due-on-Sale Clauses and Restaurants on Alienation: Does Wellenkamp Apply to Federal Institutions?* (1980) 11 Pac.L.Jour. 1085.)

Other federal court cases have come to a different conclusion. (*Meyers* v. *Beverly Hills Federal Savings & Loan Assn.* (9th Cir., 1974) 499 F.2d 1145; *Bailey* v. *First Fed. Savings & Loan Assn.* (C.D. Ill. 1979) 467 F.Supp. 1139.)

B. The Opinion Suggests, Erroneously, That Even Though Evidence of Congressional Intent is Lacking A Federal Agency Can Preempt a Field.

The suggestion that a federal agency such as the FHLBB can preempt an area without regard to Congressional intent is manifestly incorrect. The FHLBB has purported to enact regulations preempting state real property law and has concluded it has the power to preempt. (See 12 C.F.R. § 545.8-3(f) and (g) and Advisory Opinion of Federal Home Loan Bank Board in the matter of *Schott* v. *Mission Federal,* U.S.D.C. (C.D. Cal.) No. 75-366-WMB.)

Yet this Court has repeatedly held that preemption is based on Congressional intent. Thus, this Court recently stated:

> "It is uncontested that whether the [state] statute is invalid under the Supremacy Clause depends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone'. Retail Clerks v. Schermerhon (1963), 375 U.S. 96, 103. Often Congress does not clearly state in its legislation whether it intends to preempt state laws; and in such instances, the courts normally sustain local regulation on the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States. Ray v. Atlantic Richfield Co. (1978) 435 U.S. 151; Jones v. Rath Packing Co. (1977) 430 U.S. 519, 525, 540-541; Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 230." *Malone* v. *White Motor Corporation* (1978) 435 U.S. 497, 504.

A basic principle of administrative law is that agencies charged with the implementation of a statutory scheme may not promulgate regulations which go beyond the scope of their Congressional mandate. (E.g., *Civil Aeronautics Board* v. *Delta Air Lines, Inc.* (1961) 367 U.S. 316, 322.) All such regulations are void and unenforceable. (*Chrysler Corporation* v. *Brown* (1979) 441 U.S. 281.) Accordingly, in the instant case

the Board's regulations are invalid to the extent they purport to provide for preemption in areas not preempted by Congressional legislation.[6] It is important to recognize that the courts "[s]tart with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, (1946) 331 U.S. 218, 230. *Accord, People* v. *Conklin,* (1974) 12 Cal.3d 259, 265, 114 Cal. Rptr. 241, 522 P.2d 1049. "This assumption provides assurance that 'the federal-state balance,' United States v. Bass, (1971) 404 U.S. 336, 339, 30 L.Ed. 2d 488, 92 S.Ct. 515, 523, will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones* v. *Rath Packing Co.*, (1977) 430 U.S. 519, 526.

C. To Permit The Court of Appeal's Ruling On Preemption To Stand Would Be Repugnant To The Principles Embodied By The Tenth Amendment.

That land law and contract law is of peculiar state concern cannot be doubted. (*See, Hoopeston Canning Co.* v. *Cullen* (1942) 318 U.S. 313 (state law is the "source of law . . . for mortgages, and for many other legal principles affecting property interests".) *Sunderland* v. *United States* (1924) 266 U.S. 226, 232; *United States* v. *Fox* (1877) 94 U.S. 315, 320 (transfer of property a state matter).)

Recently, this Court held that the law of a state where property is located, rather than federal law, governs the right to rents collected during the period between a mortgagor's bankruptcy and the foreclosure sale of the mortgaged property. (*Butner v. United States* (1979) 440 U.S. 48, 55, ("Property interests are created and defined by state law.")).

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[6] It should be noted that a Congressional Committee questioned the Board's rulings that federal savings and loan associations do not have to comply with state laws "even in those cases where the state law affords the borrower with a greater degree of protection" S. Rep. No. 93-902, 93rd Cong. 2d Sess. (June 4, 1974), reprinted in [1974] U.S. Code Cong. & Ad. News 6119, 6130. The Committee stated, "During the Committee's consideration of this issue, some doubt was expressed that the Bank Board has the authority to preempt state law by regulation. . ." *Id.*

There can be no question that the state's historic police powers have included the regulation of real property and lending and mortgage transactions. (*See e.g., United States v. Little Lake Misere Land Co.* (1973) 412 U.S. 580, 591-592.) It has never been thought that federal associations are or could be immune from all state law.

This Court has also recently noted in a preemption case that "Commercial agreements traditionally are the domain of state law." (*Aronson v. Quick Point Pencil Co.* (1979) 440 U.S. 257, 262).

These same considerations of federalism have given rise to federal restraint in analogous settings. For example, in *United States v. Yazell* (1966) 382 U.S. 341, the Court held that where a federal agency (in *Yazell,* the Small Business Administration) itself enters into an individually negotiated loan with a private party, and the federal agency is equipped to make loans in diverse localities and is either aware of or chargeable with the knowledge that under state law the contracting party has certain defenses to the enforcement of the contract, federal law will not preempt the state statutes. This, the Court explained, is the case because where an agency is operating at the local level and can tailor an obligation to the needs of the borrower, it should do so rather than disturb expectations generated by state law systems. (*See also United States v. Kimbell Foods, Inc.* (1979) 440 U.S. 715, (held, *inter alia,* that absent a congressional directive to the contrary, the relative priority of private liens and consensual liens on personal property arising from the SBA and FHA government lending programs was to be determined by state law)).

The instant case presents an even stronger argument for concluding that federal law has not preempted the field. Unlike the situation in *Yazell,* there is no concern here for protection of the federal fisc, since federal associations are privately owned. And protection of the federal associations' interest in their security is already provided by local law. Thus, as stressed in

Yazell, there is no reason for federal law to invade an area of local concern, *i.e,* real property laws and laws governing contracts, for the benefit of a private party. (*See, Bank of America v. Parnell* (1956) 352 U.S. 29.) To do so would frustrate the purposes of the Tenth Amendment to the Constitution.

D. A Ruling that There is Preemption Would, as a Practical Matter, Defeat the Congressional Policy in Favor of Home Ownership by Increasing the Likelihood of Foreclosure and Eliminate Many Debtor Protection Laws.

The purpose of HOLA was to "provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere . . ." [7]

Congress sought to accomplish these purposes in two ways. First, it provided immediate relief to homeowners facing foreclosure.[8] Second, it sought to pump additional money into the mortgage lending industry by establishing lending institutions in areas of the country where none existed.

The second purpose, the infusion of capital, was to be accomplished by authorizing the Board to grant federal charters to privately owned and operated mortgage lenders. (12 U.S.C. § 1464).[9]

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[7] Preamble to Hola, 48 Stat. 128 (1933).

[8] The first purpose was accomplished through the creation of the Home Owners' Loan Corporation ("HOLC") which was created by § 4 of HOLA [formerly 12 U.S.C. § 1463, since repealed] for the purpose of acquiring existing mortgages (principally those in default) and to refinance them on liberal payment terms. For this purpose, Congress appropriated monies.

[9] 77 Cong. Rec. 2480 (April 27, 1933 (Cong. Luce) See Report of the House Committee on Banking and Currency (H.R. Rept. No. 55) 73d Cong. 1st Sess., p. 2 (April 25, 1933) ("House Committee Rept."); Report of the Senate Committee on Banking and Currency (Sen. Rept. No. 91) 73d Cong. 1st Sess. pp. 2-3 (May 15, 1933); Hearings on HOLA, H.R. 4980, H.R. Comm. on Banking and Currency, April 21, 1933, pp. 14-15.

Thus, the legislative history of HOLA reveals only one purpose for the creation of federally chartered savings and loan associations; to create mortgage lenders in areas where none then existed.[10] The purpose of the federally chartered savings and loans had nothing to do with state regulations or state practices; rather, it was to create mortgage lenders in areas where they did not then exist. Accordingly, there was no suggestion that Congress intended to or needed to displace state law.

To conclude at this late date that the Board has the authority to preempt application of state laws with respect to federal savings and loan associations would frustrate the undisputed congressional desire to promote home ownership since it would encourage lenders to foreclose simply because the borrower has transferred his interest in the property. Moreover, many other debtor protection laws could be swept away should the Court of Appeal's rational be applied.

For decades courts have applied state law in determining the contractual rights of federal associations *vis-a-vis* borrowers. Since there is no federal recording statute, federal associations recorded their security instruments in accordance with state laws, and their rights under these instruments have been determined under state lien priority rules.[11] The loans of federal associations have always been enforced in state courts

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[10] "The bill also provides for the board to charter Federal savings and loan associations in communities now insufficiently served by any institution or other lender on homes, so that provision may be made for the refinancing of homes in more than 1,500 counties in the United States now having no such facilities." House Committee Rept. p. 2.

[11] See, *e.g.*, *First Fed. S.&L. Ass'n v. Ott*, (Fla. App. 1973), 285 So.2d 695, *cert. denied*, 291 So.2d 10 (1974) (constructive notice); *Anatole Caron, Inc. v. Manchester Fed. S.&L.* (N.H. 1940) 10 A.2d 668 (mechanic's lien law); *First Fed. S.&L. Ass'n. v. Green-Acres Building Corp.* (Cty. Ct. 1963) 236 N.Y.S.2d 1009 (priority of lien under future advances clause); *Apex Siding & Roofing Co. v. First Fed. S.&L. Ass'n of Shawnee* (Okla. 1956) 301 P.2d 352 (equitable estoppel to assert priority).

pursuant to state laws.[12] And the rights of federally-chartered savings and loans have always been deemed to be limited by state-created rights of borrowers, such as the rights of redemption, anti-deficiency laws and other equitable defenses.[13]

State law has routinely been applied to all types of contractual disputes between borrowers and federal associations,[14] and in some instances the application of state law has resulted in the invalidity or unenforceability of those contracts.[15]

If, as Glendale and the Board suggest, Congress intended that HOLA oust state real property law in transactions between federal associations and borrowers, then it must follow that no state law can be applied to these transactions in any respect. (*Campbell v. Hussey* (1961) 368 U.S. 297; *People v. Conklin, supra,* 12 Cal.3d at 264-266 fn. 4,5). This would mean that

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[12] *See e.g., Kankakee Fed. S&L Ass'n v. Arnove* (Ct. App. Ill. 1943), 47 N.E.2d 874; *Minnesota Fed. S.&L. v. Central Enterprises of Superior, Inc.,* (Minn. 1976), 247 N.W.2d 46, *Home Fed. S.&L. v. Four Star Heights, Inc.,* (Sup. Ct. 1971), 333 N.Y.S.2d 334; *Benjamin Franklin Fed. S.&L. Ass'n v. Almond,* (Or. 1978) 577 P.2d 937.

[13] *See, e.g., In re Wilton-Maxfield Mgt. Co.* (9th Cir. 1941) 117 F.2d 913 (anti-deficiency statute); *Caudle v. First Fed. S.&L. Ass'n of Sylacauga,* (Ala. 1976) 327 So.2d 911 (statutory right of redemption); *Hartford Fed. S.&L. Ass'n v. Lenczyk* (Conn. 1966) 21 A.2d 694 (anti-deficiency law); *Tahoe Highlander v. Westside Fed. S.&L. Ass'n* (Sup.Ct. Nev. 1979) 588 P.2d 1022 (antideficiency law); *Penn Fed. S.&L. Ass'n v. Joyce,* (N.J. App. Div. 1962) 183 A.2d 114 (statutory and equitable rights of redemption).

[14] *See, e.g., First Nat'l State Bank of N.J. v. Commonwealth Fed. S.&L. Ass'n* (D.N.J. 1978) 455 F. Supp. 464, *aff'd* 610 F.2d 164 (3d Cir. 1979); *Hawkins v. First Fed. S.&L. Ass'n,* (Ala. 1973) 280 S0.2d 93); *Martyn v. First Fed. S.&L. Ass'n of West Palm Beach,* (Ct. App. Fla. 1971) 257 So.2d 576, *cert. denied,* (1972) 262 So.2d 446; *Townsend v. First Fed. S.&L. Ass'n.* (Fla. 1943) 15 So.2d 199; *First Fed. S.&L. Ass'n of Bowling Green v. Savage,* (Ct. App. Ky 1968) 435 S.W.2d 67; *Parkway Inn, Inc. v. First Fed. S.&L. Ass'n of Rochester,* (Sup.Ct. 1966), 269 N.Y.S. 2d 730, *aff'd* 279 (N.Y.S. 2d 1021 (1967); *Railroad Fed. S.&L. Ass'n v. Carr,* (App. Div. 1943) 41 N.Y.S. 2d 262; *First Fed. S.&L. Ass'n of Oklahoma v. Baxter,* (Okla. 1939) 91 P.2d 760.

[15] *See, e.g., Patton v. First Fed. S.&L. Ass'n of Phoenix,* (Ariz. 1978), 578 P.2d 152; *Tucker v. Pulaski Fed. S.&L. Ass'n,* (Ark. 1972) 481 S.W. 2d 725; *First Fed. S.&L. Ass'n of Boston v. LeClair,* (N.H. 1969) 253 A.2d 46; *Continental Fed. S.&L. Ass'n v. Fedder,* (Okla. 1977) 564 P.2d 1013; *Bellingham First Fed. S.&L. Ass'n v. Garrison,* (Wash. 1976) 553 P.2d 1090.

state lien laws, recording, foreclosure, equity provisions and other laws would be inapplicable. Such a result would be disastrous for borrowers and the real estate industry in general.

Finally, it must be asked whether the Board by regulation can simply eliminate certain vested real property and procedural rights given to California property owners. The decisions rendered by the California Supreme Court in *Tucker* and *Wellenkamp* require that before a lender in a loan assumption situation may invoke the provisions of a California real property law allowing foreclosure of a deed of trust, the lender must make a finding that there has been an impairment of security or the property has been subjected to waste. The method of exercise of the due-on-sale clause utilized by the federal association herein is the summary termination of a recorded interest in real property upon the occurrence of a transfer of the real property, without regard for the rights of the borrowers as provided under California real property law. Surely, the Board should not be able simply to take away from borrowers certain vested property rights and to permit foreclosures without the findings required by State law.

Once a state decides to grant property rights or privileges to its citizens, due process safeguards attach to those rights and privileges. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577; *Smith v. McGriff* (M.D. Ala. 1976) 434 F.Supp. 673, 680.) Since the due process constraints apply to the actions of the federal government (*Mathews v. Eldridge* (1976) 424 U.S. 319, 323), the Board cannot eliminate property rights of California citizens.

E. A Federally Chartered Savings and Loan Association Cannot Selectively Take Advantage of Those State Laws that are Favorable and Refuse to be Bound by Those that are Unfavorable.

By claiming immunity from the state law involving mortgages, while at the same time invoking and taking advantage of

other state laws, federally chartered savings and loan associations are in effect asserting the right to pick and choose those parts of state law which it will allow to be applied. Such selectivity cannot be permitted.

The notion that a litigant can "pick and choose what portion of the law binds him" was properly rejected in the leading case of *First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, (1966) 385 U.S. 252, 261. That case arose under a provision of the National Bank Act that permitted national banks to establish outside branches if such branches could be established by state banks under state law. The Supreme Court held that a national bank in Utah was not permitted to establish a new branch in the same city without taking over an existing bank, in view of a Utah statute permitting branch banking within the same city only to the extent that the proposed branch takes over an existing bank. Mr. Justice Tom Clark stated, at 385 U.S. 261 (emphasis added):

> "The Comptroller argues that Utah's statute 'expressly authorizes' state banks to have branches in their home municipalities. He maintains that the restriction, in the subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. *It is a strange argument permits one to pick and choose what portion of the law binds him.* Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there 'only to the extent that the State laws permit branch banking.' Utah clearly permits it 'only to the extent' that the proposed branch takes over an existing bank."

Mr. Justice Clark's language disapproving a litigant's being permitted "to pick and choose what portion of the law binds him" has been quoted by several federal cases, including *First National Bank of Fairbanks v. Camp*, (App.D.C. 1972) 465

F.2d 586, 592-93; *First-Citizens Bank v. Camp,* (4th Cir. 1969) 409 F.2d 1086, 1091, (rejecting the Comptroller's contention that, in resorting to North Carolina state law, he was bound only by state capitalization and state location requirements, but that he was not bound by North Carolina's "need and convenience" and "solvency of the branch" criteria [affirming *First Citizens Bank v. Camp,* (E.D.N.C. 1968) 281 F.Supp. 786, which also quoted Justice Clark, at 281 F.Supp. 789]); *Dickinson v. First National Bank in Plant City, Florida,* (5th Cir. 1968) 400 F.2d 548, 553; *Bank of Laurel, Laurel, Mississippi v. Bloom,* (S.D. Miss. 1977) 426 F.Supp. 495, 497; *Grenada Bank v. Watson,* (N.D. Miss. 1973) 361 F.Supp. 728, 733; *First Citizens Bank v. Southern National Bank of North Carolina,* (E.D.N.C. 1971) 329 F.Supp. 186, 189; *First National Bank of Catawba County v. Wachovia Bank,* (M.D.N.C. 1971) 325 F.Supp. 523, 526; and *Industrial State Bank v. Camp* (W.D. Mich. 1968) 284 F.Supp. 900, 902, (rejecting the Comptroller's contention that the provision of the Michigan Financial Institutions Act requiring the state banking commission to be satisfied as to necessity for the establishment of a branch and the prospects of its successful operation were not binding as to him.)

The People emphasize that these cases are not cited for their specific holdings as to the application of state law to branch banking (which was mandated, as to national banks, by Act of Congress), but rather for their general statement and application of the principle that a financial institution may not "pick and choose what portion of the law binds it."

Similar principles were stated by Mr. Justice Brandeis in *Buck v. Kuykendahl,* (1925) 267 U.S. 307, 316-17:

> "One cannot in the same proceeding both assail a statute and rely upon it. *Hurley v. Commissioner of Fisheries,* 257 U.S. 233, 225, 42 S.Ct. 83, 66 L.Ed. 206; Compare *Wall v. Parrot Silver & Copper Co.,* 244 U.S. 407, 411, 37 S.Ct. 609, 61 L.Ed. 1229. Nor can one who avails himself of the

benefits conferred by a statute deny its validity. *Pierce Oil Co. v. Phoenix Refining Co.*, 259 U.S. 125, 42 S.Ct. 440, 66 L.Ed. 855; *St. Louis Co. v. Prendergast Co.*, 260 U.S. 469, 472, 43 S.Ct. 178, 67 L.Ed. 351."

Here a federally chartered institution must not be permitted to avail itself of the benefits of the state law of mortgages (foreclosures, titles, recording statutes, etc.) while at the same time refusing to be bound by those portions of that law which it finds distasteful to it.

F. The Board was a Party to the Action.

Without any legal citation or reference to the record, the Court of Appeal simply held there was no jurisdiction over the Board. Such a discussion involving an important issue of jurisdiction and sovereign immunity cannot be allowed to stand.

The Court of Appeal not only overlooked clear law that a party that intervenes in an improperly removed case remains as a party upon remand to the state court (see 1A Moore's Federal Practice 2d Ed. ¶0.169 at p. 575; also at n.3; *Hirsch v. Bruchhausen* (2d Cir. 1960) 284 F.2d 786-787; *Bolden v. Brazile* (La. Ct. of App. 1964) 159 So.2d 383, 384; *see also County of San Bernardino v. Harsh California Corp.*, (1959) 52 Cal.2d 341, 345, 346) but also the many facts showing that the Board *generally appeared* in the action in state court (supra N.4).

The trial judge specifically found that the Board should be a party and also found that it had generally appeared. Moreover, the doctrine of sovereign immunity does not apply to the facts of this case. First, the doctrine only applies to suits against the government. See *United States* v. *Martin* (10th Cir. 1959) 267 F.2d 764. In the instant case, no one sued the Board—it intervened. Second, the People sought no affirmative relief against the Board. Third, the Board in its answer sought a declaration that state law could not be applied to the federal associations.

As previously noted the doctrine of sovereign immunity basically provides that the United States may not be sued absent Congressional consent. But, regardless of Congressional action, the United States may bring suit in federal *or state* courts to enforce its rights. (*E.g., Cotton* v. *United States* (1850) 52 U.S. 229.) Or it may intervene in an action pending in state court. (See, e.g., *County of San Bernardino* v. *Harsh California Corp., supra.)* The doctrine of sovereign immunity does not apply to these situations; in such cases the United States is treated as any ordinary party and it must accept whatever resolution the court may decide to be appropriate. (*Guaranty Trust Co.* v. *United States* (1938) 304 U.S. 126, 135; *United States* v. *Martin, supra.)*

The Board having become a party to the case cannot terminate its involvement at its whim. Indeed, the evidence is that the Board sought to be allowed into the litigation as a party in the first instance only because it was attempting to bolster federal court jurisdiction. It is important that this Court act to prevent such conduct by the Board, as well as other regulatory agencies, in the future.

CONCLUSION

For all the foregoing reasons, the People of the State of California urge that the Court grant the Petition for Writ of Certiorari.

DATED: January 26, 1981

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Appendix

APPENDIX

DECISION OF THE SECOND DISTRICT COURT OF APPEAL DIVISION TWO

OPINION

COMPTON, J.—The issue here presented is whether the so-called "Wellenkamp rule" (Wellenkamp v. Bank of America (1978) 21 Cal.3d 943 [148 Cal.Rptr. 379, 582 P.2d 970]) restricting enforcement of the "due on sale" clause is applicable to a federally chartered savings and loan association. In our opinion, as a result of the doctrine of federal preemption, the rule may not be applied against such an association.

This action for declaratory and injunctive relief was commenced by the State of California acting through the Attorney General and the Secretary of the Business and Transportation Agency in 1976, against Glendale Federal Savings and Loan Association (Glendale) a federally chartered institution. The trial court's decision was not rendered until September of 1979. The decision in Wellenkamp was announced in 1978.

In a triumvirate of cases, La Sala v. American Sav. & Loan Assn. (1971) 5 Cal.3d 864 [97 Cal.Rptr. 849, 489 P.2d 1113], Tucker v. Lassen Sav. & Loan Assn. (1974) 12 Cal.3d 629 [116 Cal.Rptr. 633, 526 P.119], and Wellenkamp v. Bank of America, supra,—all actions by individuals against lending institutions holding either mortgages or trust deeds on property owned by those individuals as security for loans—the Supreme Court of California has, without declaring them invalid, progressively restricted the enforceability of the so-called "due on" clauses in lending documents.

These various "due on" clauses provide for an acceleration of the due date of a secured loan upon the occurrence of a triggering event such as the further encumbering of the property, the executing of an installment contract for sale or an outright sale of the property without approval from the holder of the security.

Starting with La Sala, the court found enforcement of the clause to be a restraint on alienation where enforcement was triggered by the addition of a junior encumbrance. In Tucker v. Lassen Sav. & Loan Assn., supra, the same result obtained where the property owner entered into an installment contract for sale of the property.

Finally in Wellenkamp, in a departure from its former oldings and contrary to the overwhelming weight of authority in other jurisdictions, the court found a restraint on alienation in the enforcement of the "due on sale" clause in the case of an outright sale of the property at a time when "tight money" and high interest rates rendered the obtaining of new financing difficult and expensive.

The Home Owners' Loan Act (HOLA) 12 United States Code sections 1461-1470, adopted by Congress in 1933, authorized the establishment of federally chartered savings and loan associations and created the Federal Home Loan Bank Board (Board) which was empowered to supervise and regulate the activities of these federally chartered savings and loan associations.

HOLA, of course, makes no specific reference to the use of federal savings and loans of the myriad of contractual provisions for their protection, including the "due on sale" provision which were, and continue to be, in wide use by lending institutions.

Instead, Congress granted plenary power to the Board to regulate and mandated in its preamble to HOLA that the Board give ". . . primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States. (12 U.S.C § 1464(c)(1).

As early as 1948, the Board adopted a regulation which provided inter alia, that each loan contract of a federal savings and loan association "shall provide for full protection to the federal association." (12 C.F.R. § 545.6-11.)

The Board itself construed that regulation as authorizing the use of the "due on sale" clause as one of the widely accepted methods of protection for a lender.

On June 8, 1976, the Board adopted a more detailed regulation as follows: "An association continues to have the power to include as a matter of contract between it and the borrower a provision in its loan instrument whereby the association may, in its option, declare immediately due and payable sums secured by the association security instrument, if all or any of the real property securing a loan is sold or transferred by the borrower without the association's prior written consent." (12 C.F.R. § 545.6-11(f), amended and recodified at § 545.8-3(f) (1980).) (Italics added.)

In 1977, Glendale entered into an agreement with the developer of a condominium project to provide "take out" loans to prospective purchasers of the condominium units. When the California Department of Real Estate refused to approve the arrangement on the basis that Glendale's mortgage loan forms contained a "due on sale" provision, Glendale commenced an action against the California Real Estate Commissioner in the federal District Court for the Central District of California.

In that action, Glendale contended that the terms of its loan agreements were governed exclusively by federal law and regulations. Inasmuch as the agreement in question was entered into subsequent to the adoption of 12 Code of Federal Regulations section 545.8-3 in 1976, the district court decision dealt only with the issue of whether that regulation preempted any attempt by California to prohibit the use of the "due on sale" clause and thus found federal preemption as to any loan made after June 8, 1976. (Glendale Fed. Sav. & Loan Ass'n. v. Fox (C.D.Cal. 1978) 459 F.Supp. 903.)

The trial court in the instant action declared that by virture of the judgment in Glendale Fed. Sav. & Loan Ass'n. v. Fox, supra, the state was collaterally estopped from claiming that the

Wellenkamp rule applied to any lending instruments executed by Glendale after June 8, 1976, but that the rule did apply to lending instruments executed prior to that date.

The trial court also, in its conclusions of law, declared that it had jurisdiction over the Board, and inferentially that the Board was bound by the judgment because of Board's intervention in the case. All three parties have appealed from those portions of the judgment which are adverse to them.

In our opinion, the trial court's reliance on the doctrine of collateral estoppel was misplaced and produced an anomalous result. The issue is much broader than the collateral estoppel effect of a decision of the federal district court.

The issue is whether or not the regulatory power of the Board is such as to oust state attempts to regulate the activities of federally chartered savings and loans. If it is, there is not basis for distinguishing between loans made before and after the date of the latest federal regulation. The regulation makes it clear that the Board has always intended federal associations to avail themselves of the "due on sale" clause and any attempt to enforce such clauses in the future will have the blessing of the Board regardless of when the loan was actually executed. (See Conference of Fed. Sav. & Loan Associations v. Stein (E.D.Cal. 1979) 495 F. Supp. 12.)

It is important to note and reiterate that even in Wellenkamp, the court did not invalidate or bar the use of the "due on sale" clause in lending documents, it only prohibited its enforcement under certain market conditions.

The trial court signed a series of written "Findings of Fact" in support of its decision that the Wellenkamp rule applied to lending instruments executed prior to the effective date of the latest Board regulation—a decision which in substance held there was no federal preemption.

In summary, these "findings" declare that the California rule against the enforceability of the "due on sale" clause has an insignificant impact on federal savings and loan associations

in general, and Glendale in particular, and therefore does not interfere with interstate commerce, nor conflict with the power of Congress or the regulatory power of the Board. All of this in the face of uncontroverted and powerful evidence that the inability to enforce the "due on sale" clause has had a serious and deleterious impact on the ability of any lending institution to survive in an era of volatile and rising interest rates.

We can only conclude that those statements which purport to be "Findings of Fact" are in reality conclusions of law by the trial court which we find to be erroneous.

The concept of federal preemption of state law is grounded in the supremacy clause of the United States Constitution, article VI, clause 2. Preemption may be found in the express declaration of Congress of an intent to totally occupy a particular field, by congressional silence on one or more specific phases of an area clearly within the federal domain and fully occupied by congressional action or by the sheer pervasiveness of the federal regulation. (Parker v. Brown (1943) 317 U.S. 341 [87 L.Ed. 315, 63 S.Ct. 307]; Hines v. Davidowitz (1941) 312 U.S. 52, 66-67 [85 L.Ed. 581, 586-587, 61 S.Ct. 399].)

In assessing the ability of the states to regulate in an area of occupied by federal regulation, the courts generally apply one of two tests. (1) Is there an express congressional intent to preempt the field, or (2) is there an irreconcilable conflict between the two regulations? (Florida Avocado Growers v. Paul (1963) 373 U.S. 132 [10 L.Ed.2d 248, 83 S. Ct. 1210].) In our opinion, the application of either test to the issue here leads inexorably to the conclusion that state law has been effectively preempted.

There can be no question but that the Wellenkamp rule in California is in direct and unavoidable conflict with the Board's regulation, in that California would deny enforcement of a contractual clause specifically authorized by the Board. As we view it, the issue is simply whether the Board's regulation is a valid exercise of the power which Congress intended to bestow on it.

We must assume that Congress intended, at the very least, that the financial institutions it created would make use of the customary and accepted contractual devices employed by similar institutions, especially those devices designed to protect those institutions' solvency. It follows that the Board would be authorized to effectuate that intent by adoption of regulations.

"Pursuant to its valid statutory authority, [the Board] has promulgated comprehensive regulations covering all aspects of every federal savings and loan association, 'from its cradle to its corporate grave.' People of State of California v. Coast Federal Savings & Loan Ass'n., S. D. Cal 1951, 98 F.Supp. 311, 316." (Meyers v. Beverly Hills Federal Savings & Loan Assn. (9th Cir. 1974) 499 F.2d 1145, at pp. 1146-1147.)

In Meyers v. Beverly Hills, supra, the issue was whether California Civil Code section 1670, which declares void any contractual provision for predetermination of damages for breach, except under specified circumstances, applied to prepayment penalty provisions in real property loan documents executed by federal savings and loan associations. A board regulation, 12 Code of Federal Regulations section 545.6-12(b), specifically authorized such prepayment provisions.

The United States Court of Appeals for the Ninth Circuit held that the Board's regulation was a "valid exercise of the [Board's] delegated power, . . . so that any California law in the area is inapplicable to federal savings and loan associations operating within California." (Meyers, at p. 1147.) Inasmuch as enforcement of the provision at issue in Meyers could occur at the time of a resale or refinancing and ultimately lead to foreclosure of the property which secured the loan, the issue in Meyers was identical to the issue of enforcement of the "due on sale" clause. In fact, our research discloses that federal court decisions dealing with the issue of the preemptive effect of the Board's regulations are singularly uniform in holding that there is federal preemption.

We are aware of the fact that in Panko v. Pan American Fed. Sav. & Loan Assn. (1981) 119 Cal.App.3d 916 [174 Cal.Rptr. 240], and De La Cuesta v. Fidelity Fed. Sav. & Loan Assn. (1981) 121 Cal.App.3d 328 [175 Cal.Rptr. 467], the California Court of Appeal for the First and Fourth Districts respectively, have held that there was no federal preemption.

The Panko court placed considerable stress on the fact that HOLA, while specifically empowering the federal associations to make real estate loans, is silent with respect to "loan details." We find that silence perfectly understandable and consistent with the finding of preemption. The very purpose and objective of establishing administrative regulatory agencies is to relieve the legislative body of the task of legislating such details. (See Sunshine Coal Co. v. Adkins (1940) 310 U.S. 381 [84 L.Ed. 1263, 60 S.Ct. 907].)

It would seem that if Congress had intended federal savings and loan practices to be subject to state regulation as to "loan details," it would have been a simple matter for it to say just that. Congress' failure to specifically authorize by legislation all of the various permissable clauses to be used in lending instruments cannot be read logically to indicate such an intent.

The Court of Appeal for the Fourth District adopted much of the language of Panko but expanded on it as follows: "In the event of a foreclosure, a federal savings and loan association would undoubtedly also be subject to state law in obtaining possession of the property. And it can hardly be otherwise, for there is no federal common law of mortgages or real property. [Citations.] [¶] [The Wellenkamp decision, of course, was based on California Civil Code section 711, the source of California law on the validity of restraints against alienation of real property [citations], . . . and is part of the California law of real property and mortgages."] (De La Cuesta, at pp. 337-338.)

That rationale, as noted, is in direct conflict with the decision in Meyers v. Beverly Hills, supra. Beyond that, however, in our opinion, it erroneously characterizes the role

and effect of Wellenkamp. There is, of course, no issue raised where whether in foreclosure, recordation, priority of liens, etc. California procedure shall be applied. Whether California because of the "Wellenkamp rule," can deny the remedy of foreclosure to federal savings and loan associations is another matter entirely.

Although Wellenkamp arose in the context of a foreclosure (the exercise of a power of sale in a trust deed) the rule it enunciated has little to do with the traditional law of mortgages and real property. Wellenkamp did not postulate a rule that the "due on sale" clause itself constituted a restraint on alienation, as is popularly believed.

What Wellenkamp did was to create for California a variable transitory rule on the transferability of a secured loan, which rule is measured by the current market rate of interest on real property loans. The "restraint on alienation" condemned by Wellenkamp is thus not a restraint imposed by the individual lending institution when it includes a "due on sale" clause in its lending documents. The restraint, if it is one, is imposed by strangers to the transaction, i.e., the "going rate" of new financing and the effect of inflation on the seller's equity.

The Wellenkamp majority clearly eschewed any holding that the enforcement of the "due on sale" clause was under all circumstances, a restraint on alienation. In reality, the Wellenkamp court held that where, as a result of high interest rates and "tight money," a proposed buyer could not "afford" to pay enough money down and obtain sufficient financing for the seller to obtain cash to pay off his loan and realize his inflated equity, the loan or credit of the seller was marketable or transferable.

While we are obligated under the principle of Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450 [20 Cal.Rptr. 321, 368 P.2d 937], to follow Wellenkamp where it is applicable, we do not feel compelled to extend its application unnecessarily or give to it a status that ousts federal regulation.

In summary, under federal law, a secured real property loan made by a federal savings and loan association, is not automatically transferable to the buyer of the property regardless of the condition of the real estate or money market, Wellenkamp notwithstanding,

(3) Turning now to the appeal of the Board, we conclude that the Board was not subject to the jurisdiction of the state court.

When the complaint was originally filed in the Superior Court of Los Angeles County, the Board was not named as a party defendant. Shortly after the filing of the complaint, Glendale caused the matter to be removed to the federal district court.

The Board intervened in the action in the federal court to assert the claim of federal preemption. When the matter was later remanded to the state court, the Board make a special appearance to contest the state court's jurisdiction over the Board. The trial court maintained that the Board has submitted to its jurisdiction as a result of its intervention in and remand by the federal court. We disagree. The Board was not subject to state court jurisdiction because of the doctrine of sovereign immunity and did not voluntarily submit to the state court jurisdiction.

In view of our disposition of the merits of this appeal, however, the issue has become moot. Our holding is that the field of regulating federal savings and loan associations is exclusively within the federal jurisdiction.

The judgement is reversed and the matter is remanded to the trial court with directions to enter a judgment in favor of Glendale on the basis that federal law preempts any attempt by the state to apply the Wellenkamp rule against Glendale. The Board is dismissed from the action. The state to bear costs.

Fleming, Acting P.J., and Beach, J., concurred.

ARTICLE VI, CLAUSE 2 OF THE UNITED STATES CONSTITUTION ("THE SUPREMACY CLAUSE")

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

AMENDMENT X OF THE UNITED STATES CONSTITUTION

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

SECTION 5(a) OF THE HOME OWNERS' LOAN ACT OF 1933, 12 U.S.C. § 1464(A):

As originally enacted:

"In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (Home Owners' Loan Act, ch. 64, § 5(a), 48 Stat. 132 (1933).)

In its present form:

"(1) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under rules and regulations as it may prescribe, to provide for the organization, incorporation, exam-

ination, operation and regulation of associations to be known as 'Federal Savings and Loan Associations' or 'Federal mutual savings banks' (but only in the case of institutions which, prior to conversion, were State mutual savings banks located in States which authorize the chartering of State mutual savings banks, provided such conversion is not in contravention of State law), and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States. An association which was formerly organized as a savings bank under State law may not convert from the mutual to the stock form of ownership. An association which was formerly organized as a savings bank under State law may, to the extent authorized by the Board, continue to carry on any activities it was engaged in on December 31, 1977, and to retain or make any investments of a type it held on that date, except that its equity, corporate bond, and consumer loan investments may not exceed the average ratio of such investments to total assets for the five-year period immediately preceding the filing of an application for conversion and such an association which was formerly organized as a savings bank under State law shall only be permitted to establish branch offices and other facilities in accordance with the limitations imposed by the State law controlling applications of a savings bank organized under such State law, provided that such an association: (A) shall be exempt from any numerical limitations of State law on the establishment of branch offices and other facilities, and (B) may, in any case, subject to the approval of the Board, establish branch offices and other facilities in its own Standard Metropolitan Statistical Area, its own county or within thirty-five miles of its home office, but only in its State of domicile. An association which was formerly organized as a savings bank under State law shall be subject to the requirements of State law (including any regulations promulgated thereunder and any sanction of the violation of any such law or regulation) in effect at the time of conversion, in the State of its original charter—

(A) pertaining to discrimination in the extension of home mortgage loans or adjustment in the terms of mortgage instruments based on neighborhood or geographical area.

(B) pertaining to requirements imposed under the Consumer Credit Protection Act, if the Board determines that State law and regulations impose more stringent requirements than Federal law and regulations.

(2) A Federal mutual savings bank may make commercial, corporate, and business loans except that—

(A) not more than 5 per centum of the assets of such a bank may be so loaned; and

(B) such loans may only be made within the State where the bank is located or within 75 miles of the bank's home office.

(3) In addition to the authority conferred by paragraph (1), Federal mutual savings bank may accept demand deposits in connection with a commercial, corporate or business loan relationship." (12 U.S.C.A. § 1464(a) (1980).)

12 C.F.R. § 545.8-3(f) AND (g) (1981)*

"(f) Due-on-sale clauses. An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home

* The Federal Home Loan Bank Board's "due-on-sale" regulation originally promulgated as 12 C.F.R. § 545.6-11(1) and (g), was renumbered as 12 C.F.R. § 545.8-3(f) and (g) in 1979. See 44 Fed. Reg. 39, 108 (1979) and 44 Fed. Reg. 57, 386 (1979).

occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract."

"(g) Limitations on the exercise of due-on-sale clauses. With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association: (1) Shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument, (ii) creation of a purchase money security interest of household appliances; (iii) transfer by devise, descent, or operation of law on the death of a joint tenant; or (iv) granting of a leasehold interest of three years or less not containing an option to purchase; (2) shall not impose a prepayment charge or equivalent fee for acceleration of the loan by exercise of a due-on-sale clause; and (3) waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) agree in writing that the person's credit is satisfactory to the association and that interest on sums secured by the association's security interest will be payable at a rate the association shall request. Upon such agreement and resultant waiver the association shall release the existing borrower from all obligations under the loan instruments, and the association is deemed to have made a new loan to the existing borrower's successor in interest."

CALIFORNIA CIVIL CODE SECTION 711

"Conditions restraining alienation, when repugnant to the interest created, are void.

Opposition

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ALEXANDER L. STEVAS,

No. 81-1503

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA, etc.

Petitioners,

vs.

GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION, etc., *et al.*,

Respondents.

On Writ of Certiorari to the California Court of Appeal Second Appellate District.

STATEMENT BY RESPONDENT GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION OF CONCURRENCE IN PETITION FOR WRIT OF CERTIORARI.

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STATEMENT BY RESPONDENT GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION OF CONCURRENCE IN PETITION FOR WRIT OF CERTIORARI.

I.
PRELIMINARY STATEMENT.

The People of the State of California ("the State"), by and through the Attorney General of the State and the Secretary of the Business and Transportation Agency of the State ("the Secretary"), have petitioned this Court for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District in the within proceeding. Respondent Glendale Federal Savings and Loan Association ("Glendale Federal") concurs in the Petition and urges that certiorari be granted and that the within proceeding be consolidated for hearing and disposition with *de la Cuesta v. Fidelity Federal Savings & Loan Association*,

121 Cal.App.3d 328, 175 Cal.Rptr. 467 (1981), *prob. juris. noted*, No. 81-750 (Jan. 25, 1982).[1]

A. The Within Proceeding Provides the Court With Its Only Opportunity to Resolve the "Due-on-Sale/ Preemption" Controversy in the Context of a Trial Record, Including Economic Evidence Concerning the Impact of Exercise of "Due-on-Sale" Clauses Upon the Operations of Federal Savings and Loan Associations.

Glendale Federal contends that federal preemption of state laws pertaining to the "due-on-sale" practices of federal associations is clear as a matter of law. Nevertheless, economic evidence concerning the impact of "due-on-sale" clauses upon the operations of federal associations is relevant to, and might be of assistance to this Court in resolving, the preemption issue; *and the only case presently before the Court in which there is a trial record containing such economic evidence is the instant case*.

More specifically, both *de la Cuesta* and all of the other "due-on-sale/preemption" cases arose out of the granting of motions for summary judgment. The only case to reach this Court following a trial is the instant case; and the record in the instant case contains evidence, in the form of both empirical data and expert opinion testimony adduced by Glendale Federal, concerning the economic significance of "due-on-sale" clauses upon the operation of federal associations and the consequences that would ensue from the application of the so-called *Wellenkamp* doctrine to mortgage loan contracts of federal associations.

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[1]Glendale Federal's concurrence is not, however, intended to indicate agreement either with Petitioners' factual recitals or their legal contentions.

Hence it is only by granting certiorari in the within proceeding that this Court can be assured of resolving the "due-on-sale/preemption" controversy in the context of a trial record containing economic evidence.

B. Certiorari Should Be Granted in the Within Proceeding Both to Secure for the Court the Benefit of Participation by the State as a Party in the Resolution of the "Due-On-Sale/Preemption" Controversy and to Enhance the Prospects That the State Will Abide by the Spirit of Whatever Decision This Court Ultimately Reaches.

While the fact that the within proceeding presents a superior trial record for resolving the "due-on-sale/preemption" issue is, in and of itself, sufficient justification for granting certiorari, there are two additional, and interrelated, reasons for doing so that Glendale Federal commends to the Court's attention.

One is that by granting certiorari this Court will secure for itself both (1) the benefit inherent in having a sovereign state itself participate in a case that will decide whether or not its law is preempted by federal law; and (2) perhaps more importantly, the benefit of the State's legal knowledge in the field — a knowledge developed as a consequence of the campaign that the State has waged intermittently over the past few decades to subject federal associations to California law.

In the late 1940's, for example, the People of the State of California and the then Superintendent of Banks of the State of California sought unsuccessfully an "injunction and recovery of statutory penalties" against a federally chartered savings and loan association, Coast Federal Savings and Loan Association, one of the federal associations petitioning in *Conference of Federal Savings & Loan*

Associations v. Stein, No. 81-1192 (*pet. for cert. docketed*, Dec. 21, 1981), on the ground that it was "representing itself to be a banking institution, and transacted its business in the manner of a savings bank in violation of California state statutes and without authority". *People v. Coast Federal Savings & Loan Association*, 98 F.Supp. 311 (S.D. Cal. 1951).

A little over a decade later, in May of 1963, the then Commissioner of the California Department of Savings and Loan, acting pursuant to California Financial Code §5253, subpoenaed an officer of a federal association, one Melvin Anaya, to testify before him concerning an application for permission to establish a new branch that the federal association had filed with the Board and, specifically, with respect to the "good faith" of the federal association in submitting the application. When Anaya refused to honor the subpoena the Commissioner filed in the Los Angeles County Superior Court a petition for an order to compel him to testify, *Preston N. Silbaugh, Savings and Loan Commissioner of the State of California v. Melvin Anaya*, L.A.S.C. No. 818433. Anaya demurred generally to the petition on the ground, *inter alia*, that the California law under which the Commissioner was proceeding did not apply to federally chartered savings and loan associations; the Board interceded in the proceeding as an *amicus curiae* in support of Anaya and against the Commissioner; and ultimately Anaya's demurrer to the petition was sustained.

Beginning in late 1977, the Secretary initiated or threatened to initiate various steps to compel federal associations to comply with the State's "fair lending" laws, thereby precipitating the initiation of litigation that eventually culminated in *Conference of Federal Savings & Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*,

445 U.S. 921 (1980), holding that such state laws had been preempted.

With respect to the immediate controversy, the issue of whether federal law preempts state laws restricting the exercise of "due-on-sale" clauses in the mortgage loan contracts of federal associations, the State has been at the forefront of efforts to establish the absence of federal preemption and the consequent applicability of state law. Among other things, the Secretary filed an *amicus curiae* brief in *Schott v. Mission Federal Savings & Loan Association*, U.S.D.C. (C.D. Cal.) No. CU 75-366-WMB, asserting that state law governed the use of "due-on-sale" clauses by federal associations;[2] he filed an *amicus curiae* brief in the California Supreme Court in a companion case to *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 582 P.2d 978 (1978); *Medovoi v. American Savings & Loan Associations*, Nos. L.A. 30716 & 30717, in which he asserted that "federal law does not govern federal savings and loan associations' lending practices vis-a-vis borrowers" — this even though no federal association was a party to the case and the federal preemption issue was not presented; he refused to issue "public reports" to a real estate developer because the mortgage loan contracts of the proposed "take out" lender, Glendale Federal, did not comply with a state statute restricting the exercise of "due-on-sale" laws, Civil Code §29246, thereby precipitating *Glendale Federal Savings & Loan Association v. Fox*, No. 81-1192 (*pet. for cert. docketed*, Dec. 21, 1981); and he initiated against

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[2]*Schott* was one of the first actions, if not the first action, to present the question of whether federal law preempts state law with respect to the "due-on-sale" practices of federal associations.

Glendale Federal the action out of which the within proceeding arises.[3]

In addition to any direct benefit to the Court arising out of the State's participation, there is a possible benefit to the administration of justice by discouraging future controversy.

The State has persisted in its campaign to subject the operation of federal associations to California law despite repeated and consistent judicial rebuffs, most recently by this Court itself in *Conference of Federal Savings & Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

Glendale Federal and the federal savings and loan industry in California generally are, of course, desirous that the effort of the State in this regard, with all of the expense and vicissitudes that it has entailed, should finally and permanently cease. While there is obviously no way to assure the accomplishment of that objective, Glendale Federal nonetheless believes that direct participation by the State in the resolution of the "due-on-sale/preemption" issue, and the concomitant opportunity on its part to present the full panoply of arguments that it can muster, is best calculated to enhance prospects that the State will abide by the spirit, as well as the letter, of this Court's decision and abandon its ill-founded campaign against the federal savings and loan system in California.

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[3]The action was brought on behalf of all the People of the State of California against Glendale Federal as the representative of all federal savings and loan associations in California. Moreover, it antedated all of the cases currently pending before the case involving the "due-on-sale-preemption" issue. It was, therefore, clearly the "leading case" on the issue in California and, probably, the entire nation.

II.
CONCLUSION.

The Petition for Certiorari should be granted and the case consolidated for hearing and disposition with *de la Cuesta*.

Respectfully submitted,

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Intervenor's Brief for the United States

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No. 81-1503

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF FOR THE FEDERAL HOME LOAN BANK BOARD

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QUESTIONS PRESENTED

1. Whether a California statute prohibiting "restraints on alienation" of property, as applied to a "due on sale" clause in a mortgage written by a federal savings and loan association, has been preempted by the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. III) 1461 *et seq.*, as implemented through regulations of the Federal Home Loan Bank Board.

2. Whether a federal administrative agency that has intervened in a suit after it was removed to federal court is required, over its objection, to remain in the suit if it is remanded to state court as having been improperly removed.

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BRIEF FOR THE FEDERAL HOME LOAN BANK BOARD

OPINION BELOW

The opinion of the Court of Appeal (Pet. App. A-1 to A-9) is unofficially reported at 122 Cal. App. 3d 860.[1]

JURISDICTION

The judgment of the California Court of Appeal for the Second Appellate District was entered on August 21, 1981. A petition for rehearing was denied on September 1, 1981. The California Supreme Court denied petitioner's petition for hearing on October 28, 1981. The petition for a writ of certiorari was filed on January 26, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

[1]See page 3, *infra*.

STATEMENT

1. In 1976, petitioners filed suit in the California Superior Court for the County of Los Angeles, requesting a declaratory judgment that respondent Glendale Federal Savings & Loan Association had been violating Cal. Civ. Code § 711 (West 1954), which forbids unreasonable restraints on alienation of property (Pet. App. A-1). The suit alleged that Glendale had been including and enforcing due-on-sale clauses[2] in mortgages in violation of California law and requested an injunction.

Glendale removed the suit to federal court under 28 U.S.C. 1441(b). Subsequently, the Federal Home Loan Bank Board intervened under Fed. R. Civ. P. 24 in order to argue that its regulation allowing federal savings and loan associations to include and enforce due-on-sale clauses in their mortgages, 12 C.F.R. 545.8-3(f), preempted California law. The district court subsequently determined that the case had been improperly removed and remanded it to the California Superior Court (Pet. App. A-9).

After remand, the Board appeared specially to contest the state court's jurisdiction over it. The Superior Court held, however, that the intervention in federal court waived the Board's right to contest the state court's jurisdiction (Pet. App. A-9).

On the merits, the Superior Court held that petitioner was collaterally estopped to seek enforcement of Cal. Civ. Code § 711 (West 1954), for any loan instruments issued after June 8, 1976 (the effective date of the Board's regulation) because of a prior judgment entered by a United States District Court in *Glendale Federal Savings & Loan Association* v. *Fox*, 459 F. Supp. 903 (C.D. Cal. 1978). As for

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[2] A due-on-sale clause permits the lender to declare the entire balance of the loan due if the property securing it is transferred without the prior written consent of the lender.

loans issued prior to that date, the trial court held that there was no preemption (Pet. App. A-3 to A-4).

2. The Court of Appeal reversed (Pet. App. A-1 to A-9). It held that state law was preempted with regard to due-on-sale clauses for all loans issued by federal savings and loan associations regardless of when the loan was issued (*id.* at A-4). It also held that the trial court had improperly exercised jurisdiction over the Board because the intervention in federal court could not fairly be construed as a voluntary submission to the jurisdiction of the state court (*id.* at A-9). The court also noted that, in any event, that issue was moot in light of the holding that the Board's regulation preempted state law (*ibid.*).

The California Supreme Court denied petitioners' petition for hearing, but ordered the opinion of the Court of Appeal not to be published in the State's official reports (Pet. 1 n.2) in accordance with Cal. Ct. R. 976, and thereby stripped the decision of its precedential value within California.

ARGUMENT

The issue raised by petitioners (Pet. 6-17) with regard to the preemptive effect of the Board's regulation concerning the use in mortgages of due-on-sale clauses by federal savings and loan associations is identical to that presently before the Court in *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, prob. juris. noted, No. 81-750 Jan. 25, 1982). The Court therefore should hold this petition pending its decision in *de la Cuesta* and then dispose of it as appropriate in light of that decision.

Petitioners also seek review (Pet. 17-18) of the Court of Appeal's decision that the state courts lacked jurisdiction over the Board in this case. The court's holding that the Board was not required to remain a party in state court after the remand from federal court was correct and, in any

event, does not warrant review by this Court. It is well settled that the United States and its agencies cannot be sued, in state or federal court, unless Congress expressly provides for such suits. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 705 (1949); *Minnesota* v. *United States*, 305 U.S. 382, 387, 388-389 (1939); *Cunningham* v. *Macon & B.R.R.*, 109 U.S. 446, 451 (1883).

Petitioners cite no authority that would allow them to sue the Board in state court and, indeed, the relevant statutory provision, 12 U.S.C. 1464(d)(1), specifies that the Board can be sued only in federal court. Thus, the only possible basis for the exercise of jurisdiction by the state court is that the Board intervened in the state court proceeding and thereby consented to the court's jurisdiction. Even assuming that the Board could intervene in state court without explicit statutory authority, see *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 229 (1957); *Stanley* v. *Schwalby*, 147 U.S. 508, 513 (1893), it did not do so here. As the Court of Appeal correctly noted, "[t]he Board * * * did not voluntarily submit to the state court jurisdiction" (Pet. App. A-9). Obviously, the Board's motion to intervene in federal court cannot reasonably be interpreted as a waiver of the Board's immunity to suit in a state court.

In any event, the Court of Appeal properly recognized that, in light of its disposition on the merits, the jurisdictional issue lost its independent significance (Pet. App. A-9). Once this Court decides *de la Cuesta*, the preemptive effect of the Board's regulation will be finally decided in all courts and there will be no need to decide whether the Board could have been bound by the state court's determination. The issue at this point is thus strictly academic and obviously not suitable for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, No. 81-750.

Respectfully submitted.

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